IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-1699

ISAAC K. BYRD, JR., KATRINA M. GIBBS, AND BYRD, GIBBS & MARTIN, PLLC, f/k/a BYRD & ASSOCIATES, PLLC — APPELLANTS

V.

WILLIE J. BOWIE, INDIVIDUALLY, AND CHARLES BROWN, INDIVIDUALLY, BEING THE SOLE WRONGFUL DEATH BENEFICIARIES OF LOIS BROWN, DECEASED — APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF RANKIN COUNTY

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Katrina M. Gibbs
Byrd Gibbs & Martin, PLLC

Appellant

Hiawatha Northington II
Northington Law Firm

Attorneys for Appellant

Willie J. Bowie
Charles Brown

Appellees

Stephen Gowan

Eddie Abdeen

Attorneys for Appellees

Hon. Samac Richardson

Circuit Court Judge, Rankin County, Mississippi

SO CERTIFIED, this the 23 day of May, 2007.

Hiawatha Northington II
Counsel for Appellants

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STATEMENT REGARDING ORAL ARGUMENT

The Appellants respectfully request oral argument, submitting that such argument would aid the Court in rendering an opinion in this matter.

STATEMENT OF ISSUES

I. **The Circuit Court of Rankin County erred in granting summary judgment to Bowie.**

A. **The trial court erred in concluding that this Court's holding in *Byrd v. Bowie*, 933 So. 2d 899 (Miss. 2006) established all elements of the legal negligence claim against the Byrd Defendants.**

B. **The deemed admissions as to damages are insufficient to establish that summary judgment as to damages is appropriate.**

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in Court Below

This is an appeal from the Circuit Court of Rankin County, wherein the Circuit Court granted summary judgment to the Plaintiffs, Willie Bowie and Charles Brown ("Bowie"), as against Isaac K. Byrd, Jr., Katrina M. Gibbs, and Byrd Gibbs & Martin, PLLC ("Byrd Defendants") in the amount of $2,000,000.00.

The attendant facts of this appeal have traversed a circuitous route. In *Bowie v. Montfort Jones Mem. Hosp.*, 861 So. 2d 1037 (Miss. 2003), the Supreme Court affirmed the sanction of dismissal with prejudice of a medical negligence case for a discovery violation where the Byrd Defendants identified a medical expert and provided an affidavit beyond the deadlines set in a scheduling order. *Id.* at 1039.

Bowie subsequently filed a Complaint against the Byrd Defendants in the Circuit Court of Rankin County, Mississippi, alleging legal negligence. The trial court granted partial summary judgment to Bowie as to the liability of the Byrd Defendants based on certain deemed admissions by the Byrd Defendants. It accepted the admission that Byrd was negligent, but rejected the admission as to a stated amount of damages. At the end of oral argument on the motion for partial summary judgment, the trial court stated, "The plaintiff's Motion for Partial

Summary Judgment will be granted as to the negligence issue but denied as to the monetary value." C.P. at 88.

On interlocutory appeal to the Supreme Court of Mississippi, this Court held, in *Byrd v. Bowie*, 933 So.2d 899 (Miss. 2006), that the Byrd Defendants were negligent as a matter of law in belatedly identifying a medical expert in the underlying medical negligence case. At the end of its opinion, the Supreme Court stated that "we find the trial court was correct in its rulings and affirm the trial court in toto," and remanded the matter for further proceedings. *Id.* at 907. C.P. at 19.

Upon remand, Bowie filed another motion for summary judgment, seeking judgment in the amount of $2,000,000.00 based on alleged deemed admissions. C.P. at 29. The trial court conducted a hearing and concluded that the admissions as to the amount of damages in this case were valid and proceeded to enter judgment in the amount of $2,000,000.00 against the Byrd Defendants. T. at 17-18, C.P. at 89-90. It is from this final judgment that the Byrd Defendants appeal.

SUMMARY OF THE ARGUMENT

The rulings of this Court in *Byrd v. Bowie*, 933 So.2d 899 (Miss. 2006) centered on its acceptance of the deemed admission of negligence and its conclusion that the Byrd Defendants were negligent as a matter of law. Bowie failed to appeal the denial of the motion for partial summary judgment as to the amount of damages. Bowie incorrectly asserted that they did not have to prove that the Byrd Defendants' negligence was the proximate cause of injury.

In legal negligence cases, one must prove that the lawyer's negligence was the proximate cause of damages by proving that the plaintiff in the legal negligence case would have prevailed in the underlying action absent the lawyer's negligence. There was no proof in this case that Bowie would have prevailed in the underlying wrongful death action, nor any finding on that issue by a trier of fact. On remand, the trial court should have forced Bowie to prove that the Byrd Defendants' alleged negligence was the proximate cause of Bowie's injuries, whatever they were alleged to be, and if it was, what amount of damages was appropriate. Because the trial court determined that Bowie was not required to prove anything further as to liability, the trial court below erred.

Additionally, the trial court erred in determining that damages should be set at $2,000,000.00. There was no basis in fact for reaching this conclusion, save for the arguable deemed admissions of the Byrd Defendants. Bowie placed no other

proof in the record to justify the award of $2,000,000.00 and admittedly relied on the Byrd Defendants' estimate of potential liability for purposes of a malpractice insurance claim. The trial court was correct in its initial concern that damages were within the province of the jury and should not have been the subject of summary judgment.

The alleged deemed admissions regarding damages, in and of themselves, are not sufficient to support an award of $2,000,000. As the damages are unliquidated, summary judgment should not have been granted as to damages. Bowie should have conducted a hearing on the record to justify any damage award. Because no other evidence is found in the record to support the damage award, summary judgment was not proper and the trial court erred.

STANDARD OF REVIEW

The Mississippi Supreme Court's position is clear on the standard of review for summary judgments.

> The standard for review for summary judgments in Mississippi is well established. The Court reviews summary judgments de novo. *Hardy v. Brock,* 826 So. 2d 71, 74 (Miss. 2002). The facts are viewed in light most favorable to the nonmoving party. *Id.* The existence of a genuine issue of material fact will preclude summary judgment. *Id.* Where disputed facts exist or where different interpretations or inferences may be drawn from undisputed facts, summary judgment is inappropriate. *See Johnson v. City of Cleveland,* 846 So. 2d 1031, 1036 (Miss. 2003).

Eckman v. Cooper Tire & Rubber Co., 893 So. 2d 1049, 1052 (Miss. 2004).

Summary judgment is a powerful tool to be used sparingly. *Lupo v. State Dept. of Transp.*, 771 So. 2d 358, 361 (Miss. 2000). Any motion seeking summary judgment should be viewed with great skepticism. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993).

ARGUMENT

I. The Circuit Court of Rankin County erred in granting summary judgment to Bowie.

A. The trial court erred in concluding that this Court's holding in *Byrd v. Bowie*, 933 So. 2d 899 (Miss. 2006) established all elements of the legal negligence claim against the Byrd Defendants.

The trial court below found that Bowie did not need to prove that the Byrd Defendants' alleged negligence was the proximate cause of Bowie's alleged injuries. This finding is contrary to the law of legal malpractice in Mississippi.

In legal negligence cases, a plaintiff must prove three elements: existence of a lawyer-client relationship; negligence on the part of the lawyer in handling his client's affairs entrusted to him; and proximate cause of the injury. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1215 (Miss. 1996), *citing Hickox v. Holleman,* 502 So. 2d 626, 633 (Miss. 1987). "As to the third essential ingredient, the plaintiff must show that, but for their attorney's negligence, [the legal malpractice plaintiff] would have been successful in the prosecution or defense of the underlying action." *Id.*

While this Court's ruling in *Byrd v. Bowie*, 933 So. 2d 899 (Miss. 2006) establishes that Byrd was negligent "as a matter of law," such ruling is silent as to causation *vis-a-vis* the legal negligence case. The proof of Bowie's claims required that the plaintiff prove the "case within the case." Here, Bowie must have shown that but for the Byrd Defendants' alleged negligence, Bowie would have

prevailed against the hospital and health care professionals originally sued in Attala County.

While often referred to as a "proximate cause" analysis, the Supreme Court has also said that "our cases suggest in fairly absolute 'but for' terms that a legal malpractice plaintiff must make these showings [that the plaintiff would have prevailed in the underlying case]." *Singleton v. Stegall*, 580 So. 2d 1242, 1246 (Miss. 1991). Where the underlying case is one of medical negligence, the plaintiff must show that, but for the lawyer's misstep, the plaintiff probably would have prevailed in the medical malpractice case. *Id.*, *citing Hickox*, 502 So. 2d at 633-34.

Based on the substantive law, then, the trial court still had before it the question of whether the Byrd Defendants' alleged negligence actually caused Bowie any injury, and if so, what amount of damages would be appropriate. In the context of this case:

> the plaintiff/client carries this burden by trying the underlying medical malpractice claim as a part of this legal malpractice case, not by trying to prove or recreate what would or may have happened in some other court at some other time and place. More specifically, the 'success' component of plaintiff's burden involves no attempt to show what would have happened if the [action had been filed within the statute of limitations]. Rather, the issues that would have been tried [in the failed action] are made up and tried in the legal malpractice suit as the first step in plaintiff's claim here.

Hickox, 502 So. 2d at 634.

Under Mississippi medical malpractice law, unless a healthcare provider's

acts or omissions are so obviously negligent as to be evident to a layperson, "negligence can be proven . . . only where the plaintiff presents medical testimony establishing that the defendant physician failed to use ordinary skill and care." *Powell v. Methodist Health Care-Jackson Hospitals*, 876 So.2d 347, 348 (Miss. 2004). Because Bowie's motion for summary judgment was a request for judgment as a matter of law, to succeed Bowie must have shown that there was no genuine issue of material fact that original medical defendants breached a duty of care and such breach caused the death of Lois Brown.

Of course, nothing in the record evidences any proof that Bowie would have prevailed in the underlying wrongful death action. Bowie submitted no affidavits from medical experts stating causation as to the underlying medical negligence action. Moreover, absent a sworn statement from a qualified medical expert of the specific content of the duty of care applicable to the facts of the case, and absent that expert's analysis of the breach of the duty, there is no evidence of medical malpractice here and, therefore, no evidence of any injury caused by the alleged negligence of the Byrd Defendants. Without evidence to shift the burden of production to Byrd, Bowie's motion for summary judgment should have failed. *Smith*, 597 So. 2d at 1302-03.

Because the trial court did not properly interpret this Court's prior ruling in *Byrd v. Bowie*, this Court should remand this matter for further proceedings, with instructions that the Court found only that the Byrd Defendants' actions

constituted a breach of the applicable standard of care, and that the matter must be developed further in light of Bowie's burden of proof in the context of the legal negligence claim against the Byrd Defendants.

B. The deemed admissions as to damages are insufficient to establish that summary judgment as to damages is appropriate.

The trial court further found that that was no genuine issue of material fact as to damages, when it granted Bowie's motion for summary judgment as to damages. Bowie's sole basis for seeking summary judgment was again based on alleged deemed admissions as to damages.

The Byrd Defendants, in the prior interlocutory appeal of the summary judgment as to liability, extensively briefed the issue of why there was a genuine issue of material fact as to whether the alleged deemed admissions in this case, including those as to damages, were ever actually served on the Byrd Defendants or their agents, and why they should have been withdrawn. *See Byrd v. Bowie*, 933 So. 2d at 902-03, 907-08 (Miss. 2006). Those issues are still applicable to the instant appeal.

Nonetheless, this Court must still review the summary judgment award of damages *de novo*, and evaluate whether the deemed admission, taken in the light most favorable to the Byrd Defendants, is sufficient to warrant a $2,000,000.00 judgment. First, this Court must determine what constitutes issues of material fact. "A fact will be considered material if it has a tendency to decide any of the

issues of the case which have been properly raised by the litigants." *Davidson v. North Central Parts, Inc.*, 737 So. 2d 1015, 1016 (Miss. App. 1999)(citing *Pearl River County Bd. of Supervisors v. South East Collections Agency, Inc.*, 459 So. 2d 783, 785 (Miss. 1984)).

This Court has justifiably been careful to make sure that the trial bench and bar understand the nature of Rule 56 and its requirements.

> Many trial judges in this state seem not to have grasped the application of Rule 56 nor to realize what is meant by a genuine issue of material fact. Consequently, they are hasty in granting summary judgment, thereby benefiting none of the parties litigant. We remind the Bench and Bar of this Court's language in *Brown v. Credit Center, Inc.*, 444 So. 2d 358 (Miss. 1983):
>
> > Trial judges must be sensitive to the notion that summary judgment may never be granted in derogation of a party's constitutional right to trial by jury. Miss. Const. Art. 3, Section 31 (1890). On the other hand, there is no violation of the right of trial by jury when judgment is entered summarily in cases where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. There is no right of trial by jury in such cases.

Brown v. McQuinn, 501 So. 2d 1093, 1095 (Miss. 1986). Summary judgment should not be used to circumvent a trial on the merits where there are genuine issues of material fact. *Moore ex rel. Moore v. Memorial Hosp.*, 825 So. 2d 658, 663 (Miss. 2002).

The trial court was appropriately skeptical in the first instance about granting Bowie's motion for summary judgment.

> The plaintiff's Motion for Partial Summary Judgment will be granted as to the negligence issue *but denied as to the monetary value*. I'm of the opinion that the proof of claim that's filed in the bankruptcy court in Maryland, that the two million is an estimate and that alone. If the Byrd law firm had gone to Maryland to prove that two million dollars they might not could have proved all of it. They may could have proved more, they may could have proved less. *That's a fact issue to be determined by a jury the value of this case*. (emphasis added).

C.P. at 88. Upon remand, and still somewhat reluctant about the awarding of damages, the trial court noted at the last hearing in this matter:

> Now, I don't know if it's – I don't really know what's the best way to handle it. But I do know that if it had been – well, who knows what, any amount of money, I guess. If the plaintiffs in this case had submitted a request for admissions and said admit that this – that the plaintiffs, in the case I've got right here that I'm looking at, is $50 million, I don't think that I could award that. It would seem very unfair to me if the plaintiffs in this case asked for any damages over the amount that was stated in the request for admissions. I think it would be a great mischaracter [sic] of justice.
>
> Anything in that amount or less, I think, is deemed admitted, based on the court's prior rulings and what the Supreme Court says, . . .

T. at 18-19. The trial court then went on to assess damages at $2,000,000.00. T. at 19.

What is conspicuously absent, then, is any explanation as to why the damages in this particular matter should amount to $2,000,000.00. It is axiomatic that in any case for damages, the evidence must bear out some reasonably calculated basis for a damage award. This Court has held that when sufficient evidence to sustain a damage award is not presented, such award will be reversed.

See e.g., *Illinois Cent. R. Co. v. Hawkins*, 830 So. 2d 1162, 1174 (Miss. 2002) (reversing jury award of $1,500,000 to mother of decedent who witnessed crash, because there was insufficient proof in the record to justify the award). Here, there is no other evidence, beside the alleged deemed admissions, to support an award of damages in the amount of $2,000,000.00.

As a general rule, summary judgment is inappropriate in cases which involve unliquidated damages. *Newsome v. State*, 922 S.W.2d 274, 281 (Tex. Ct. App. 1996); *Moeller v. Fort Worth Capital Corp.*, 610 S.W.2d 857, 862 (Tex. Ct. App. 1980). Although the alleged deemed admission as to damages may be proof that the Byrd Defendants represented to a third party that the maximum exposure on this case was $2,000,000.00,[1] it certainly does not act as a stipulation as to the amount of damages, nor does it liquidate the damages. *See Gray v. Parker*, 1997 WL 198145 (Tex. Ct. App. 1997)(not designated for publication)(finding that deemed admissions were not sufficient to justify award of actual damages in a specific amount).

Even assuming *arguendo* that it is sufficient for any court to base a damage award on deemed admissions, Mississippi law still requires that the damage award be an appropriate one. "What is needed at the one trial to which a party is entitled is an evidentiary 'foundation upon which the trier of fact can form a fair and

[1] The record reflects that the only place where the $2,000,000 figure originated was the bankruptcy claim filed by the Byrd Defendants with regard to the insolvency proceedings of their malpractice insurance carrier. T. at 16-17.

reasonable assessment of the amount' of damage." *Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.*, 725 So. 2d 902, 914-15 (Miss. 1998), quoting *Ham Marine, Inc. v. Dresser Industries, Inc.*, 72 F.3d 454, 462 (5th Cir. 1995). In this case, there is nothing to establish what the $2,000,000.00 damage award represents. Does the award represent loss of consortium for Bowie? Does it represent lost wages from the decedent Lois Brown? Is it based on fraud? Was the award made in equal amounts to each plaintiff? Is any portion of the award attributable to any non-party? Is there a punitive damage component to the award, based on a finding that the Byrd Defendants had breached a duty? Before any damage award is given, the record must reflect a basis for the same. Such is not present here, and the alleged deemed admissions as to damages certainly do not preclude any genuine issues of material fact.

If a jury had awarded damages in this case in the amount of $2,000,000.00, and an appeal was taken from that award, this Court would be closely reviewing the record to determine what, if any, evidence there was to support said verdict. The Byrd Defendants are unduly and unfairly prejudiced by the court's judgment setting damages at $2,000,000.00. Not only have they not had the opportunity to rebut the amount alleged as damages, but also they have not been afforded the benefits of Mississippi law requiring itemization of damages or apportionment of liability and damages among available tortfeasors. *See, e.g.*, Miss. Code Ann. § 85-5-7 (apportionment statute). Just as a defendant in a default judgment is

entitled to an evidentiary hearing on unliquidated damages, even though the Complaint may have asked for a specific amount to which no response was made, so too should a evidentiary hearing be required to support a damage award based on alleged deemed admissions. *Cf. Capital One Services, Inc. v. Rawls*, 904 So. 2d 1010, 1018-19 (Miss. 2004)(requiring an evidentiary hearing on the record as to damages after entry of default judgment). Because there was insufficient proof to support the $2,000,000.00 damage award, the trial court must be reversed.

CONCLUSION

The circuit court erred in granting the motion for summary judgment, and awarding damages in the amount of $2,000,000.00, an error which should be corrected by this Court, and it is respectfully submitted that the Court should REVERSE AND REMAND this matter to the Circuit Court of Rankin County for trial on the merits as to damages.

RESPECTFULLY SUBMITTED,

BY: _____
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CERTIFICATE OF SERVICE

I, Hiawatha Northington II, hereby certify that I have this day caused to be mailed by United States mail, postage pre-paid, a true and correct copy of the above and foregoing instrument to the following:

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